Editor's note: 100 I.D. 370

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

IBLA 93-14, 93-15, 93-57 Decided October 19, 1993

Appeals from a decision of the Colorado State Director, Bureau of Land Management, upholding a decision of the San Juan Resource Area Manager approving application for permit to drill COC 26082, and separate appeals from the decision of the San Juan Resource Area Manager approving right-of-way COC 53315. SDR-CO-92-13 and SDR-CO-92-14.

Decision on APD set aside and remanded; decision on right-of-way reversed.

1. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Wilderness--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   A determination that approval of an application for a permit to drill an exploratory well and the grant of an associated right-of-way will not have a significant impact on the quality of the human environment will be affirmed on appeal where the record establishes that a careful review of the environmental problems has been made, relevant areas of environmental concern have been identified, and the final determination is reasonable. The party challenging a FONSI has the burden of establishing by a preponderance of the evidence that the finding was based on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial

environmental question of material significance. Mere differences of opinion provide no basis for reversal if BLM's decision is reasonable and supported by the record on appeal.

2. Federal Land Policy and Management Act of 1976: Wilderness--Oil and Gas Leases: Unitization

While the authorized officer was clearly possessed of the authority under sec. 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), to precondition approval of a unitization agreement involving a pre-FLPMA oil and gas lease upon acceptance of the application of the nonimpairment standard to lands within a WSA, where he failed to do so the Board will not retroactively impose this condition on leased lands within a WSA.

3. Administrative Authority--Federal Land Policy and Management Act of 1976: Wilderness--Oil and Gas Leases: Suspensions

The Secretary of the Interior and those authorized to act on his behalf have the discretionary authority to suspend operations and production under any oil or gas lease for conservation purposes, including the prevention of environmental damage. Where the record indicates that an environmental assessment prepared for drilling operations on an oil and gas lease located within both a WSA and an area of critical environmental concern failed to consider this option in evaluating the proposal to drill, the decision approving drilling operations will be set aside and the case will be remanded to permit consideration of whether, under this discretionary authority, operations under the lease should be suspended.

4. Alaska National Interest Lands Conservation Act: Generally--Federal Land Policy and Management Act of 1976: Rights-of-Way--Oil and Gas Leases: Generally

The provisions of sec. 1323(b) of ANILCA, 16 U.S.C. § 3210(b) (1988), do not apply with respect to access to a Federal oil and gas lease since the leasehold estate does not constitute "nonfederally owned land" within the meaning of the statute.

5. Federal Land Policy and Management Act of 1976: Wilderness--Oil and Gas Leases: Generally

Issuance of a Federal oil and gas lease carries with it neither an express nor implied right of access to the leasehold. Thus, where a pre-FLPMA lease is surrounded

by lands within a WSA, there is no valid existing right, within the meaning of section 701(h) of FLPMA, to obtain access to the lease boundaries across Federal land and, in the absence of grandfathered uses, access may not be granted if it would violate the nonimpairment standard mandated by sec. 603(c), 43 U.S.C. § 1782(c) (1988).

6. Administrative Authority--Federal Land Policy and Management Act of 1976: Wilderness--Oil and Gas Leases: Unitization

Since no express or implied rights of access arise upon issuance of a Federal oil and gas lease, the approval of the committal of a pre-FLPMA lease to a unit plan subsequent to the adoption of sec. 603(c) of FLPMA does not alter the application of the nonimpairment standard in determining whether access to the lease across other lands within the unit may be permitted.

Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984), no longer to be cited.

APPEARANCES: Stephen Koteff, Esq., Salt Lake City, Utah, for Southern Utah Wilderness Alliance and the Utah and Rocky Mountain Chapters of the Sierra Club; Paul Zogg, Esq., Boulder, Colorado, and Todd Robertson, Esq., Denver, Colorado, for the Colorado Environmental Coalition; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By record of decision dated August 28, 1992, the San Juan Resource Area (SJRA) Manager, Bureau of Land Management (BLM), pursuant to an Application for Permit to Drill (APD) filed by Ampolex Exploration (U.S.A.) Inc. (Ampolex), approved a finding of no significant impact (FONSI) and announced his intention to proceed with Alternative No. 2 of environmental analysis (EA) No. CO-030-SJ-92-24 authorizing the drilling of the Ruin Canyon No. 3

well in the SW¼ SW¼ sec. 20, T. 37 N., R. 19 W., New Mexico Principal Meridian, within the Cross Canyon Wilderness Study Area (WSA) on oil and gas lease COC 26082. By separate decision record of the same date, the Area Manager also determined to proceed with the issuance of an APD-related access right-of-way to Ampolex. On September 8, 1992, the APD was approved and right-of-way COC 53315 was issued to Ampolex.

On September 8, 1992, the Colorado Environmental Coalition (CEC) filed a request for State Director Review (SDR) of the decision of the Area Director to approve the APD and issue the right-of-way and further requested an immediate suspension of those decisions. On September 11, 1992, the Deputy State Director informed CEC that he was "granting a stay with regard to all approved operations related to the Ruin Canyon well #3 in the Cross Canyon Wilderness Study Area." 1/ By decision dated September 25, 1992, the Deputy State Director upheld the decision to approve the APD. See SDR-CO-92-13. CEC subsequently appealed from this decision, which appeal was docketed as IBLA 93-15.

On September 28, 1992, the Southern Utah Wilderness Alliance (SUWA) and the Utah and Rocky Mountain Chapters of the Sierra Club (Sierra Club) also sought SDR from the decision approving the APD for the Ruin Canyon No. 3 well. By decision dated October 6, 1992, the Deputy State Director

1/ This action also had the effect of staying any action under the right-of-way grant since the right-of-way grant, itself, expressly provided that "[t]his grant is not valid without an approved APD."

again upheld the decision to approve the APD. See SDR-CO-92-14. SUWA and the Sierra Club subsequently appealed from this decision, which appeal was docketed as IBLA 93-57.

While CEC had expressly challenged the decision to issue the associated right-of-way COC-53315 in its request for SDR, it is clear that

SDR was not available for review of that decision. See 43 CFR 2804.1(b). Accordingly, on October 7, 1992, CEC filed a separate appeal from the decision issuing the right-of-way. On October 8, 1992, SUWA and the Sierra Club filed their own appeal from the issuance of the right-of-way. These appeals were docketed as IBLA 93-14.

Thereafter, appellants filed a request that the Board continue the stay imposed by the State Director pending Board resolution of the appeals. By order dated January 29, 1993, the Board granted the requested stay, consolidated the appeals for adjudication and notified the parties that, in view of the importance of the issues presented, the Board would expedite consideration of the appeals consistent with its other responsibilities. Briefing on the issues presented was completed on May 17, 1993. 2/ The matters raised are, thus, now ripe for adjudication.

2/ We note that, in its response to appellants' reply brief, BLM filed a motion seeking to have the reply stricken as untimely under 43 CFR 4.414. Technically, this regulation, by its own terms, is applicable only to the submission of an answer to a statement of reasons and, even then, makes the acceptance of an untimely answer subject to the Board's discretion. The acceptance of all subsequent filings is similarly committed to the sound discretion of the Board. In the instant case, while the correct procedure would have been to file a request for leave to file a reply brief together with that brief, the failure of appellants to file such a request has not

As an initial matter, we note that appellants challenge BLM's actions on two broad bases. First, they argue that approval of the APD and the associated right-of-way without the prior preparation of an environmental impact statement (EIS) violated the provisions of the National Environmen-tal Policy Act (NEPA), 42 U.S.C. § 4321 (1988). Second, they also argue that approval of the APD and the associated right-of-way violated the provisions of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988). We will review these contentions seriatim.

The NEPA challenge revolves around the failure of BLM to prepare an EIS to assess the environmental consequences of the proposed APD and the associated right-of-way. Subsequent to the filing of the request for an APD and a right-of-way, the San Juan Resource Area commenced development of an EA to examine the proposed action, together with certain alternatives, 3/ in order to provide BLM with a basis for determining whether the proposal should be approved and whether the preparation of an EIS was warranted. In accordance with these goals, BLM prepared a Draft EA and distributed copies to those who had expressed an interest in commenting on the proposal. Thereafter, as noted above, a Final EA was issued on August 28,

---

fn. 2 (continued)
worked to BLM's detriment as it has timely responded to the matters raised therein. Accordingly, in the absence of any showing of prejudice, we deny BLM's motion to strike.

3/ The alternatives to Ampolex's proposal which were ultimately considered were Ampolex's original proposal with certain conditions of approval attached, two different site locations within the Cross Canyon WSA, one site location outside of the WSA, permitting only helicopter access to the proposed wellsite, and a no action alternative. See Final EA at 3.

1992. At the same time, the Area Manager signed a record of decision (ROD) approving Alternative No. 2 of the Final EA (i.e., the Proposed Action subject to various conditions of approval (COA)) and, expressly relying on

the various mitigation measures therein provided, approved the FONSI. On that same date, the Area Manager also approved issuance of the associated right-of-way. This latter decision was approved by the District Manager

on September 8, 1992.

The Final EA examined, at some length, the impact of the Ampolex proposal on the environment existing within the Cross Canyon WSA. Physically, the EA described the area as consisting of "relatively flat-lying mesa tops ranging in elevation from 6200 feet to 6600 feet * * * dissected by deep broad canyons whose bottoms can be as much as 900 feet from the canyon rims" (Final EA at 18). Additionally, the EA expressly referenced a number of previously-issued environmental documents in describing the general nature of the area being affected. 4/

As the EA noted, the area of the proposed well and the associated right-of-way, besides being within a WSA, was also an area of significant cultural importance relating primarily to the Anasazi occupation. Indeed, it was located within the Anasazi Culture Multiple Use Area of Critical Environmental Concern (ACEC), established in 1986 and encompassing approximately 156,000 acres of land. Inasmuch as the effects of the proposed

---

4/ The EA referenced Chapter Two of the EIS prepared for the Resource Management Plan (RMP) in 1984, the Wilderness EIS prepared in 1990 at
3-11 through 3-15, and the Cross Canyon WSA Study Report at 243 through
248 (Final EA at 20).

action on cultural resources is one of the chief bases of appellants' challenge to the FONSI, we deem it appropriate to set out the EA's discussion of the affected cultural environment at some length. The Final EA noted:

> The vicinity of the proposed action (Cow Mesa) is one of the densest archaeological site areas in the Southwest. Sites recorded to date on Cow Mesa are primarily structural sites dating to the Anasazi occupation (300-1300 A.D.). A substantial portion of the mesa top has never been "chained". Chaining is a process whereby a large chain, attached to two tractors travel-ling parallel and about 60 feet apart, is dragged across a forested region in order to tear out by the roots pinon/juniper trees, shrubs, and sagebrush in preparation of the land for conversion to grassland. Cow Mesa is the only Mesa in the SJRA that has not been chained. Consequently, the mesa is, in terms of its pristine archaeological preservation, very sensitive to any surface disturbing activities. Smaller features and activity areas that establish important site associations remain preserved and are not scattered or destroyed by chaining activity and erosion, as in other areas. The significance of this area is advanced even further as these important associations cannot be found undisturbed at such magnitude elsewhere in Colorado. This, in addition to close proximity of this mesa top to Cross and Ruin Canyons which are known to be major drainage system transporta-tion routes with related sites, makes "setting" an integral part of their significance and integrity as well (see criteria for site eligibility to the National Register of Historic Places in 36 CFR 60.4). Colorado University and Fort Lewis College are currently doing archaeological studies in the area to further define habitation and interrelationships, if any, among them.
>
> A Class III (intensive) cultural resource inventory of the proposed action (Alternative No. 1) and Alternative No. 4 has been performed and approved. To date twelve (12) archaeological sites have been located and recorded. All are considered significant and potentially eligible to the National Register of Historic Places (NRHP). Additional sites recorded during inventory on the private surface access road and well relocation have been evaluated in a similar manner. Of the sites recorded to date, eight (8) are Anasazi habitation sites or pueblo/pit structures. The other four are limited activity or special activity areas likely associated with the overall intensive Anasazi use of the mesatop areas from about 300 AD to 1300 AD. In addition, four sites are multi-component sites, meaning that two or more occupations of the same site area occurred through time. In summary, the cultural resource inventory performed for this proposed project in conjunction with other recent surveys in this area, revealed an extremely high site density estimated as >210 sites

> per square mile, of stratified, significant Anasazi sites representative of a variety of functions during all prehistoric Anasazi periods with the exception of Pueblo I. Pueblo I components were not evident from surface observations, but could be present in buried deposits.

(Final EA at 24-25).

While the Final EA also briefly mentioned the wilderness values associated with the area of the proposed action, the primary discussion of these values was contained in the Final Wilderness Environmental Impact Statement (WEIS) which had been prepared to evaluate the various effects attendant to designating or not designating the eight WSA's located in the San Juan and San Miguel Planning Area as part of the National Wilderness System. The discussion in the WEIS was expressly referenced in the EA and, accordingly, we set forth the salient points relating to existing wilderness values as found therein.

In discussing the existing environment, the WEIS noted that Cross Canyon WSA was primarily natural in character with the only existing human imprints being three vehicle ways, 5/ none of which significantly impaired the area's naturalness (WEIS at 3-13). The WEIS expressly found that the WSA possessed "outstanding" opportunities for solitude and for primitive,

---

5/ For purposes of wilderness designation, the word "roadless" referred to the absence of roads which had been improved and maintained by mechanical means. A "way" maintained solely by the passage of vehicles did not constitute a "road" for the purpose of determining whether or not an area was "roadless." See Wilderness Inventory Handbook, dated Sept. 27, 1978, at 5; Idaho Trail Machine Association, 75 IBLA 256, 258 (1983).

unconfined types of recreation. Furthermore, the WEIS recognized the existence of archaeological, ecological, and educational supplemental values which further enhanced the wilderness qualities found within the WSA. Id. Balanced against these values, however, was the fact that, of the 12,588 acres within the Cross Canyon WSA, 8,875 acres (approximately 71 percent
of the total acreage) were within 36 pre-FLPMA oil and gas leases which had issued without surface occupancy restrictions. See WEIS 2-14 through 2-17.

The Final EA also noted that various small mammals, reptiles and bird species were found in the area year round and others were seasonal visitors. Of particular importance in the confines of this appeal, the Final EA noted that a review of existing data showed the occasional presence or the potential for occurrence of a number of species listed as Threatened and Endangered (T & E), or proposed for listing or a candidate for such listing. Included in this discussion were the Bald Eagle, the Black-footed Ferret, and the Mexican Spotted Owl. 6/ See Final EA at 20-23.

Having described the existing environment, the Final EA then turned to a comparison of the effects which the proposed action and the other alternatives would have on these values. While the action under review (Proposed Action with COA) was listed as Alternative No. 2, the bulk of the discus-sion as to this alternative was subsumed under the discussion of Alternative

---

6/ While the Final EA considered the Mexican Spotted Owl as a Federal Proposed Species, the Fish and Wildlife Service formally designated the Mexican Spotted Owl as a Threatened Species during the pendency of this appeal. See 58 FR 14248 (Mar. 16, 1993). The issues surrounding the Mexican Spotted Owl are examined in greater detail subsequently in this decision.

No. 1 (Proposed Action). Accordingly, we will recount the relevant conclusions as to anticipated impacts as reported for that alternative.

Insofar as cultural values were concerned, the EA noted that allowing vehicular traffic into the area (which, as noted above, was part of the Anasazi Culture Multiple Use ACEC) would increase the potential for vandalism of the numerous archaeological sites found in the general vicinity (Final EA at 26). The EA also noted that all of the 12 cultural sites located during the inventory had the potential for being adversely affected by surface disturbing operations. Further, the EA noted that:

> Areas that are rich in cultural properties which have been virtually untouched for the last several centuries are rare in the Southwest and as such are extremely important for cultural and natural history enjoyment and study. This combination of cultural resource and natural values can be directly impacted by air pollutants, intrusions, and nonconformities to the landscape; and physically by levels of surface and vegetative disturbance, vibration, and erosion.

Id. at 27.

With respect to indirect impacts of the proposed development on cultural resources, the EA noted that 660 archaeological sites were estimated to be within a 1-mile radius of the area and would be subject to increased vandalism if long term access across the mesatop were provided and not controlled or monitored. Cumulatively, the EA noted that each new well which might be constructed within the Anasazi Culture Multiple Use ACEC would

increase the danger of vandalism proportionately and result in the incremental loss of the archaeological setting not only on Cow Mesa but also on surrounding lands (Final EA at 27-28).

The EA also examined the effect of the proposal on the wilderness values of the area. While the EA noted that there would be some direct

and indirect impairment of wilderness values by the proposed action, particularly during the construction phase, the EA concentrated its analysis on the cumulative impacts which would result from future drilling within

the Cross Canyon WSA. See Final EA at 34-35. The EA reiterated the projection of the WEIS that five test wells would likely be drilled within the WSA and that, of these, two wells could be expected to produce 400 barrels of oil and 800 mcf of gas per day during the next 20 years. The estimated surface disturbance associated with full development of all 36 pre-FLPMA leases was 52 acres with impacts from the sights and sounds extending to an additional 480 acres. While the wilderness value of this acreage would be diminished, the EA repeated the conclusion of the WEIS that the wilderness values of the WSA, as a whole, "would remain largely unchanged." Id., quoting the WEIS at S-4.

Insofar as the effects on listed, candidate, and proposed species under the Endangered Species Act, 16 U.S.C. § 1536 (1988), were concerned, the EA noted that the major impact would be expected to occur to migratory bird species such as the Bald Eagle if drilling were permitted during the winter when these birds would generally be present, since the associated

noise and disturbances would cause them to avoid the area. See Final EA at 30-32. The EA had noted, however, that there were no known winter roost sites for the Bald Eagle within or near the proposed project site. See Final EA at 22. Any impacts to the Black-footed Ferret were generally discounted since there was no known population of this species in the area and, in the absence of any prairie dog population in proximity, the possibility of the ferret's presence in the vicinity was viewed as extremely slight (Final EA at 30-31). With respect to the Mexican Spotted Owl, the

EA noted that its presence within the Cross Canyon WSA had not been confirmed, even though the area of the wellsite had been delineated as a potential habitat (Final EA at 22). However, the EA further noted that should the species occupy the area at some later date, they might leave the vicinity during construction and drilling operations but would be expected to reoccupy the area thereafter. Further indirect or cumulative impacts to this species by the proposal were considered "negligible to non-existent" (Final EA at 32).

The EA then discussed the numerous conditions of approval which became part of the approved alternative (Alternative No. 2). The most extensive part of the COA dealt with the anticipated impacts on cultural values. While recognizing that site avoidance is the usually preferred method for protection of cultural sites, the EA noted that this was not possible with respect to the existing way. Accordingly, the EA listed a number of alternative restrictions which could be applied where necessary. See Final EA at 43. The EA directed that where significant sites would unavoidably be impacted by operations, acceptable data recovery would be performed after

consultation with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation. See also Final EA, Appendix F, COA No. 9. Furthermore, all operations were expressly limited to areas where cultural resource inventories had been completed and approved by BLM and Ampolex was required to have a licensed archaeologist present during the road construction phase to oversee padding of two sites and fencing of nine additional sites. Final EA, Appendix F, COA Nos. 8, 15, 16, 17, 18, and 19. Additionally, in order to control access to minimize the danger of vandalism, BLM also required that a guard be present at the entry point of the WSA during all periods of drilling activity and required the installation of a locked gate should the well be completed as a producer. Final EA, Appendix F, COA No. 7.

Additional conditions were attached to the proposal to alleviate some of the impacts on wilderness and wildlife values. Among these restrictions were a limitation on the commencement of drilling activities to the period from April 1 to November 1 unless a waiver was granted by BLM, direction that habitat features which might provide potential habitat to Threatened and Endangered Species were to be avoided, and a requirement that sound-muffling techniques were to be used on all noise generating equipment if noise was subsequently deemed to have become a problem. See Final EA at 42, 47, Appendix F, COA Nos. 4 and 12.

As noted above, based on the analysis of the proposed project set forth in the EA, together with the mitigating measures directed to be

taken to alleviate the adverse impacts, the San Juan Resource Area Manager

determined that the issuance of a FONSI was appropriate and approved the APD with the recommended COA (Alternative No. 2) and issuance of the associated right-of-way.

[1] In its appeal to the Board, appellant CEC challenges the determination not to prepare an EIS. 7/ CEC vigorously asserts that approval of the APD will have significant direct, indirect, and cumulative impacts on the area where development is authorized, which it categorizes as "extraordinarily sensitive" (CEC SOR at 4). Referring to the area's pristine nature, the wildlife habitat which it provided, its rare and extremely rich archaeological resources and its asserted "unique old growth vegetation," CEC argues that "even the most minimal of activity" would result in a significant impact on the environment. Id. In our view, however, while there is no gainsaying the area's significant environmental assets, a close scrutiny of the specifics of appellant's allegations fails to establish error in BLM's determination not to prepare an EIS for the subject proposal.

To the extent that the challenge to the FONSI is premised on possible effects upon the pristine nature of the area, anticipated impacts were closely examined in the WEIS which was prepared in 1990. It was, in fact, the nature of the conflicts between mineral development and wilderness preservation, clearly delineated in the WEIS, which led BLM to recommend that the Cross Canyon WSA not be included within the permanent wilderness

7/ We should point out, in this regard, that CEC admitted that it "does not generally fault the Environmental Assessment prepared by the San Juan Resource Area Manager," noting that, in its view, the EA had been prepared with greater care than usual (CEC SOR at 2-3).

system. Moreover, both the WEIS and the EA concluded that, even given full field development the foreseeable cumulative impact on wilderness values of the WSA, as a whole, "would remain substantially unchanged" (Final EA at 34). We can find no basis for overturning the FONSI insofar as impacts to wilderness values are concerned. 8/

Appellant CEC also criticizes the EA's analysis of the impacts of the proposed action on wildlife, particularly on the spectrum of T & E species (listed, proposed, candidate), complaining that "little has been done to document the presence of these species and the potential impacts of oil and gas development on these species" (CEC SOR at 5). In point of fact, however, the EA did examine potential impacts of development on the seven T & E species of wildlife.

With respect to four candidate species (Swainson's Hawk, the Southwestern Willow Flycatcher, the Loggerhead Shrike, and the Northern Goshawk), the EA expressly noted that the proposed wellsite was not in

the species habitat of any of those species (Final EA at 22-23) and that

any impact associated with elevated noise levels during exploration would

be dependent upon whether construction activity occurred during the winter

8/ We recognize that the FONSI determination that full field development would not "substantially" change the wilderness values of the WSA might be seen as somewhat at odds with the recommendation that the Cross Canyon WSA not be included within the permanent wilderness system because of the conflict between mineral development and wilderness preservation. See WEIS 2-12 to 2-22. Be that as it may, any question as to whether the Cross Canyon WSA should be recommended for inclusion in the wilderness system is not only tangential to the instant appeal, it is also beyond the purview of this Board's jurisdiction in a direct appeal. See, e.g., Colorado Open Space Council, 109 IBLA 274, 281 (1989).

migratory period (Final EA at 31). Insofar as the Bald Eagle was concerned, the EA noted that, while there were no known or documented winter roost sites for the Bald Eagle within or near the proposed project site, the Bald Eagle was a seasonal visitor to the area (Final EA at 21-22). The EA concluded, however, that any direct and indirect impacts would be significantly reduced by scheduling construction and drilling operations outside of the wintering period (Final EA at 30-31). With regard to the Black-footed Ferret, as noted above, the absence of a prairie dog prey population made the likelihood of Black-footed Ferret occupation extremely remote.

Insofar as the Mexican Spotted Owl was concerned, a private survey of the Cross Canyon area had been previously commissioned to examine the area to ascertain whether any Mexican Spotted Owls were present, prior to allowing a proposed seismographic project. During this survey, "possible Mexican spotted owl responses similar to the agitation call of the female were elicited at one calling station" in the NW¼ sec. 30. While an owl was subsequently observed in the early morning darkness, positive identification was not possible "although its small size would seem to rule out its identity
as a Mexican spotted owl." The Golden, Colorado, Office of the Fish and Wildlife Service (F&WS) subsequently concurred in the study's conclusion that there was no evidence of Mexican Spotted Owls in the Cross Canyon Area. 9/ See Final EA, Appendix C (Memorandum dated June 27, 1990, from

---

9/ Indeed, the F&WS memorandum noted that a simultaneous Mexican Spotted Owl survey conducted by an expert with the Forest Service had also failed
to discover any spotted owls in the Cross Canyon area. The memorandum noted that:

"Even though the pinyon-juniper habitat of the Cross Canyon area is superficially similar to that of Mesa Verde fifty miles to the east where

Acting State Supervisor, Fish and Wildlife Enhancement, F&WS, to Area Manager, SJRA, BLM). This concurrence was reiterated on July 2, 1991, when F&WS concurred in a finding of no effect on the Mexican Spotted Owl with respect to notices of intent to conduct oil and gas exploration in Cross Canyon. Id. The FONSI with respect to this species seems eminently justifiable.

Insofar as the area's undisputed archaeological values are concerned,

a review of the EA and ROD shows that the decision-makers were, indeed,

most concerned with the effects of the proposed action on these values. As set forth above, numerous COA's were devised to lessen the impacts, both short and long-term, on cultural artifacts. Admittedly, not all of the sites could be totally avoided, particularly with respect to the associated right-of-way. As a result, the COA provided for padding of two of these sites and protective fencing of nine others and expressly noted that "[a]ll project activity is confined to those areas covered by archaeological surveys and approved by BLM" (EA, Appendix F, COA No. 23).

It must be admitted, of course, that, even with the various safeguards provided by BLM, the mere construction of the road heightens the possibility

---

fn. 9 (continued)
Mexican spotted owls occur, the pinyon-juniper woodland at Cross Canyon
is a lower elevation phase with a warmer climate. The higher elevation pinyon-woodland habitat at Mesa Verde contains steeper-walled canyons with small amounts of Douglas fir and receives more cold air drainage. It is suspected that the function of the vegetation types, primarily mixed conifer, required by the Mexican spotted owl, is one of thermal regulation. Thus, the warmer pinyon-juniper woodlands in the Cross Canyon area do not provide cool enough habitat for the Mexican spotted owl. We have no records ourselves, historical or current, of Mexican spotted owls being
in the Cross Canyon area."
Id.

of vandalism by making the immediate area of the well-pad more accessible than it had been heretofore. But, by the same token, it must also be recognized that the area is presently accessible by means of a way and that construction of the access road does not essentially alter the reality of access as it presently exists. Moreover, the controls on access which BLM requires Ampolex to implement can be expected to minimize any increased likelihood of vandalism occasioned by the improvement in access. In any event, we note that, having been apprised of the projected impacts and the mitigating measures which BLM was ordering, the SHPO, on May 12, 1992, concurred with BLM's determination that the proposed road "will have no adverse effect" on any listed or eligible historic properties. Viewed in light of the mitigating measures BLM has directed, we cannot say that the impact

on the cultural resources in the area (which, as noted above, is merely a minuscule part of an ACEC embracing a total of 156,000 acres) could be said to be one "significantly affecting the quality of the human environment."

Finally, a word is in order with reference to what appellant CEC refers to as the "unique old-growth vegetation" which can be found on Cow Mesa. As noted above, the existence of this vegetation is the direct result of the fact that Cow Mesa had never been chained. Nothing in the proposed action, however, will change this condition. It is true, of course, that drilling activities in the immediate area of the well-site as well as construction of the access spur from the existing way would necessitate the removal of trees from approximately 1.9 acres of land. See Final EA at 13. While appellant might understandably find even this disturbance objectionable, allowance of the proposal simply would not result in the destruction of a significant

amount of the previously undisturbed pinyon-juniper woodlands found on Cow Mesa. The overwhelming majority of the old-growth pinyon-juniper stand would remain untouched.

The Board has frequently noted that a FONSI will be affirmed if the record establishes that a careful review of environmental problems has been undertaken, relevant areas of environmental concern have been identified, and the final determination that no significant impact will occur is reasonable in light of the environmental analysis. See, e.g., Hoosier Environmental Council, 109 IBLA 160, 173 (1989); Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). A party challenging a FONSI determination must show it was premised on a clear error of law or demonstrable error of fact or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. See, e.g., Powder River Basin Resource Council, 124 IBLA 83, 91 (1992); Hoosier Environmental Council, supra.

In the instant case, as set forth above, appellant has simply failed to establish that significant impacts are likely to occur from the action as approved. Furthermore, the Board has also pointed out that where BLM has prepared an earlier EIS discussing impacts of proposed management decisions, subsequent analyses may briefly summarize the impacts more fully explored in the EIS, a process known as "tiering." See, e.g., Southern Utah Wilderness Alliance, 122 IBLA 6, 10 n.4 (1991); Michael Gold (On Reconsideration), 115 IBLA 218, 225 n.2 (1990). The Final EA, herein, expressly referenced both the WEIS and the San Juan/San Miguel Resource

Management Plan (RMP) EIS (December 1984), which both contain relevant discussions of environmental impacts likely to occur in the Cross Canyon Area as a result of the approval of Alternative 2, particularly as they relate to wilderness values. See WEIS at 2-12 to 2-22, 3-11 to 3-15, 4-9 to 4-16; SJ/SM RMP EIS at 2-54, 3-55 to 3-57, 5-21 to 5-23. We believe the Final EA was properly tiered into these two EIS's 10/ and that they reinforce the determination that a FONSI was appropriate in the circumstances. In view of the foregoing, we must conclude that appellant CEC has failed to establish error in the failure of BLM to prepare an EIS with respect to the instant proposal.

[2] The second basis for challenging the decision below is advanced by all of the parties to this appeal. Noting that both the wellsite and the access road are located on land within a WSA, the parties argue that allowance of the APD and associated right-of-way violates the nonimpairment standard which governs WSA's and cannot be justified as either the exercise of "grandfathered" rights under section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), or as recognition of valid existing rights protected by

---

10/ While we agree with BLM that these two EIS's contain relevant analyses with respect to the proposed action, we must also concur with CEC that it is difficult to see the relevance of the Colorado Oil and Gas Leasing and Development EIS (January 1991). While this EIS was directed toward oil and gas leasing and development, a review of the document shows that it was clearly aimed at evaluating actions undertaken pursuant to the SJ/SM RMP and determining whether the RMP should be amended. The RMP, however, was itself primarily concerned with future leasing actions and had determined that all future oil and gas leases in the general area would be impressed with a no-surface occupancy restriction. See RMP at 63. While the oil and gas EIS examined whether or not these COA's should continue, it did not really address the problems associated with pre-FLPMA leases such as the lease involved herein which had been issued without surface occupancy restrictions.

section 701(h) of FLPMA, 90 Stat. 2786 (1976). Thus, quite apart from any question as to whether BLM complied with the dictates of NEPA, appellants assail the decision herein as constituting a violation of the provisions of FLPMA. We turn now to that question.

Initially, there is no substantial dispute that the proposed project, particularly the upgrading of the access road, violates the nonimpairment standard. 11/ Nor does BLM suggest differently. It is equally clear from the record that BLM's actions herein cannot be sustained under the "grandfathered uses" exception to the nonimpairment standard. See, e.g., Rocky Mountain Oil and Gas Association v. Watt, 696 F.2d 734 (10th Cir. 1982); Southern Utah Wilderness Alliance, 125 IBLA 175, 100 I.D. 15 (1993); Richard C. Behnke, 122 IBLA 131 (1992). BLM's actions herein must be affirmed, if they are to be affirmed at all, on the basis that the allow-ance of the violation of the nonimpairment standard implicit in the action approved can be justified as the recognition of valid existing rights. And, in examining this issue, it will be necessary, for reasons explained below, to differentiate between approval of the APD and issuance of the associated right-of-way.

With respect to the APD, while appellants admit that the subject lease issued prior to the adoption of FLPMA and did not contain any express

11/ It seems self-evident that, to the extent that BLM permits Ampolex to mechanically maintain the prior existing "way," BLM has, in effect, permitted Ampolex to upgrade the "way" to a "road." See n.5, supra. As we noted in Southern Utah Wilderness Alliance, 125 IBLA at 185, "[A]ll road construction within a WSA automatically constitutes a violation of the non-impairment standard," because, by definition, a WSA must be a "roadless" area. [Emphasis in original.]

provisions limiting the lessee's rights in the premises, they raise two discrete challenges to BLM's assertion that recognition of the lease rights requires that BLM permit on-site drilling. First, they argue that, even assuming arguendo that Ampolex may have, at one point in time, been vested with the absolute right to drill on the lease, this absolute right lapsed upon the failure of the lessee to successfully drill a well within the initial 10-year term of the lease. While they appreciate that Ampolex's lease was extended beyond its primary term by inclusion in the McElmo Dome Unit, they contend that, since this extension occurred subsequent to the adoption of FLPMA, Ampolex's lease rights were thereby conditioned by the management requirements of section 603(c) of FLPMA.

Alternatively, appellants argue that, even if the post-FLPMA extension of Ampolex's lease did not result in the imposition of a total prohibition of impairment of wilderness values, this does not mean that Ampolex has an absolute right to drill within the WSA. Rather, relying on the provisions of the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72014 (Dec. 12, 1979), appellants contend that nonimpairment standards apply unless application of these standards would unreasonably interfere with the claimant's rights to use and enjoyment of its lease. Since, in appellants' view, directional drilling from an area outside of the WSA would be feasible, they argue that the nonimpairment standard should be applied herein and the APD denied. Before examining these issues, a brief review of the chronology involving this lease is in order.

Oil and gas lease C-21139, embracing, inter alia, the SW¼ sec. 20, T. 38 N., R. 19 W., New Mexico Principal Meridian, issued effective July 1, 1974, to William R. Thurston for an initial term of 10 years and so long thereafter as oil or gas were produced in paying quantities. On October 8, 1976, 100 percent of the record title interest in the lease was assigned to Mobil Oil Corporation. By decision dated November 30, 1977, the State Office noted that certain lands within lease C-21139 had been committed to the Hovenweep Canyon Unit Agreement, effective May 26, 1977, which, pursuant to 43 CFR 3107.3-2, resulted in the segregation of the non-committed lands (including the SW¼ sec. 20) into a new lease, which was assigned serial number C-26082. Inasmuch as more than two years remained in the original term of the base lease, the new lease would terminate, in the absence of production of oil or gas in paying quantities, at midnight on June 30, 1984, unless otherwise extended by law.

Lease C-26082 was committed to the Cow Canyon Unit effective April 27, 1978. Thereafter, on April 1, 1983, the lease was committed to the McElmo Dome Unit. The following day the Cow Canyon Unit was terminated. Production under the McElmo Dome Unit was achieved effective December 15, 1983, prior to the expiration date of the lease and, accordingly, pursuant to the provisions of 30 U.S.C. § 226(m) (1988), the lease was thereby extended. Appellants correctly note that, but for the lease's inclusion within the McElmo Dome Unit plan and the successful completion of a well under that plan, the instant lease would have expired under its own terms. Appellants argue that, under the applicable statutes the Secretary is vested with discretionary authority to approve or disapprove unit plans of development

and, therefore, Ampolex had no "right" to insist on approval of the unit. Thus, appellants contend, extension of the term of the lease by its committal to a unit after the adoption of section 603 of FLPMA was not a "right" existing at the time of FLPMA's enactment and, thus, cannot be a valid existing right removed from the prescriptions of section 603(c).

Appellants are correct in their assertion that the approval of unit plans of development requires the exercise of discretion by the Secretary of the Interior or his delegate. The applicable regulation, 43 CFR 3183.3-1 (1984), 12/ provided that "[a] unit agreement will be approved by the authorized officer upon a determination that such agreement is necessary or advisable in the public interest and is for the purpose of more properly conserving natural resources." This regulatory provision is echoed in section 2(b) of the standard lease terms, utilized herein, in which the lessee agrees:

> Within 30 days of demand * * * to subscribe to and to operate under such reasonable cooperative or unit plan for the develop-ment and operation of the area, field, or pool or part thereof, embracing the lands included herein as the Secretary of the Interior may then determine to be practical and necessary or advisable, which plan shall adequately protect the rights of all parties in interest, including the United States.

Pursuant to the above provisions, this Board has affirmed decisions of BLM both requiring unitization of on-shore oil and gas leases (see Chevron U.S.A., Inc., 111 IBLA 96 (1989)) as well as refusing to approve proposed

12/ This regulation was substantially revised and renumbered in 1988 and now appears at 43 CFR 3183.4(a). The language quoted in the text, however, appears in both versions of the regulation.

unitization or communitization agreements (see Kirkpatrick Oil Co., 32 IBLA 329 (1977), aff'd, 675 F.2d 1122 (10th Cir. 1982)). There is, in short, little question that the authorized officer could have refused to approve the commitment of the subject lease to the McElmo Dome Unit unless it was expressly accompanied by the acceptance of such surface use limitations

as would result in observance of the nonimpairment standards for that part of the leased land located within the boundaries of the WSA. He clearly

did not do so. The question which, in effect, appellants raise is whether, notwithstanding the failure of the authorized officer to precondition approval of the unit agreement on such provision, the lease is nonetheless impressed with such a condition.

We note that the relevant part of the text of section 603(c) of FLPMA provides that "[d]uring the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness * * *." Thus, under this provision, the Secretary is affirmatively directed to manage lands within a WSA so as not to result in impairment of their wilderness characteristics. In our view, had an interested party brought a direct challenge at the time of the authorized officer's approval of the committal of the instant lease to the McElmo Dome Unit, committal would properly have been made contingent upon the application of the nonimpairment standard to so much of the lease as was within the Cross Canyon WSA. No such objection, however, was timely lodged. And, in

the absence of any language in section 603(c) which could fairly be characterized as self-executing, 13/ we are unwilling at this late date to retroactively apply such a limitation to the lease herein involved.

Our conclusion in this regard is fortified by recognition of the fact that, as we have often had cause to note, voluntary unitization agreements are essentially contractual in nature. See, e.g., Coors Energy Co., 110 IBLA 250, 257 (1989); Colorado Open Space Council, 109 IBLA 274, 287 (1989); Shannon Oil Co., 62 I.D. 252, 255 (1955). In entering into such arrangements the various parties quite appropriately consider their individual interests in proceeding upon a course of unified field development. Thus, if at the time that the instant lease were committed to the McElmo Dome Unit the authorized officer had expressly preconditioned his approval on the application of the nonimpairment standards to the lands within the Cross Canyon WSA, it is possible that the lessee would have declined to join the unit and would have, instead, attempted to individually develop the

13/ Thus, we would contrast the general precatory language of section 603(c) of FLPMA with the specific language of section 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (1988), which provided that the terms and conditions of federal coal leases would be subject to readjustment "at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." Prior to this amendment, leases were subject to readjustment at 20-year intervals. In Franklin Real Estate Co., 93 IBLA 272 (1986), the Board noted that, while actual readjustment of the terms and conditions of the lease required affirmative action by BLM, the language of the statute, as explicated by implementing regulations, operated to shorten the period between readjustments to ten years, even where BLM had failed to timely readjust the terms of the coal lease after its initial 20-year term. Accord, General Electric Holdings, Inc., 103 IBLA 366 (1988), aff'd sub nom. Trapper Mining Inc. v. Lujan, 923 F.2d 774 (10th Cir. 1991). There is, however, nothing in the language of section 603(c) which could be construed to effectuate imposition of the condition outlined in the text in the absence of affirmative action by the authorized officer to effectuate such a result.

lease during its remaining primary term. Retroactive application of conditions which might have affected the willingness of parties to enter into a joint undertaking in the first instance necessarily alters the basis upon which the parties had agreed to proceed.

This reality, in our view, militates strongly against appellants' contention that, even though it was clearly not within the contemplation

of the parties signatory to the unit agreement, the agreement should now

be interpreted as limiting the rights of pre-FLPMA lessees to develop all lands within their leases to actions which do not result in unnecessary or undue degradation of those lands. Accordingly, we must reject appellants' assertion that, to the extent the subject lease includes land now within a WSA, the extension of the lease beyond its primary term because of its committal to a post-FLPMA unit must be read as abrogating any valid existing rights to develop the land in a manner which might impair its suitability for inclusion in the permanent wilderness system.

[3] Notwithstanding the foregoing, however, we believe it appropriate, under the circumstances of this case, to set aside the decision below to the extent that it approved the APD filed by Ampolex. We note that an apparent inconsistency exists in the provisions of the IMP relating to oil and gas development on pre-FLPMA leases within WSA's. As originally promulgated in 1979, the relevant provisions of the IMP clearly provided that:

> Activities on pre-FLPMA leases on which there were no pre-FLPMA impacts will be allowed if the BLM determines that the impacts satisfy the nonimpairment criteria. If proposed

> activities are denied because they cannot satisfy the nonim- pairment criteria, the lessee has the right to request a suspension of operation. The policy on lease suspension is explained more fully in section (d) below.

(IMP at III.J.1.a., 44 FR 72029 (Dec. 12, 1979)). Section (d), referenced above, noted that:

> For leases not encumbered with wilderness protection or no-surface-occupancy stipulations and on which an application for an otherwise acceptable plan of operation was denied for wilderness or endangered species considerations, the Secretary has established a policy of assenting to a suspension of operation or production for the time necessary to complete necessary studies and consultations and, if applicable, for a decision on wilderness status to be made.

(IMP at III.J.1.d., 44 FR 72029 (Dec. 12, 1979)).

In 1983, however, the provisions relating to application of the nonimpairment standard to pre-FLPMA leases were substantially revised. See 48 FR 31854-56 (July 12, 1983). In this revision, the language appearing at III.J.1.a., quoted above, was deleted and the following discussion substituted:

> All pre-FLPMA leases represent valid existing rights, but the rights are dependent upon the specific terms and conditions of each lease, including any stipulations attached to the lease. Activities for the use and development of such leases must satisfy the nonimpairment criteria unless this would unreasonably interfere with rights of the lessee as set forth in the mineral lease. When it is determined that the rights conveyed can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. Nevertheless, even if such activities impair the area's wilderness suitability, they will be allowed to proceed.

(IMP at III.J.1.a., 48 FR 31855 (July 12, 1983)).

This amendment clearly resulted in a marked change in the treatment of pre-FLPMA leases since, under the 1979 IMP, impairing activities could not be allowed whereas under the 1983 amendments such activities would be authorized if necessary to the exercise of the rights conveyed by the lease. However, for reasons which are unclear, no change was made to the provisions of the 1979 IMP appearing at III.J.1.d. That section still provides that, where APD approval is denied for pre-FLPMA leases because of wilderness considerations, the Secretary has established the policy of granting a suspension of operations until a determination on the wilderness status has been made. Thus, on the one hand, section III.J.1.a. of the IMP presupposes that impairing activities will be allowed while section III.J.1.d. of the IMP proceeds on the assumption that, in some cases, these impairing activities will not be allowed.

A review of the Federal Register notice of the 1983 changes fails to disclose any explanation for this apparent conflict. Indeed, these changes were promulgated without any explanation of the intended results. 14/ We recognize, of course, that it is possible to interpret III.J.1.d. as applying to those situations in which a post-FLPMA lease issued without a wilderness protection stipulation. In fact, the Board has applied this provision

14/ It is, of course, likely that the animating rationale behind these changes was a desire to reflect the conclusions enunciated in Solicitor Coldiron's Opinion styled The Bureau of Land Management Wilderness Review and Valid Existing Rights, M-36910 (Supp.), 88 I.D. 909 (1981). However, while a review of that Opinion clearly delineates the concerns which led to the revision of section III.J.1.a. of the IMP, it sheds no light on the impact which these conclusions had, if any, on the residuary authority of the Secretary, under 30 U.S.C. § 209 (1988), to suspend any lease for conservation purposes. In other words, this Opinion explains why section III.J.1.a. was changed; it does not explain the intent in leaving section III.J.1.d. unaltered.

to precisely such a situation. See, e.g., Amoco Production Co. (On Reconsideration), 96 IBLA 260 (1987). The question is whether or not it is applicable only to situations involving post-FLPMA leases issued without a wilderness protection stipulation. We think not.

First of all, the language of section III.J.1.d., which was clearly applicable to pre-FLPMA leases under the 1979 version of the IMP, was not altered in any way by the 1983 revisions. This replication of the language lends some support to the conclusion that the scope of this provision was not being altered. More importantly, it must be recognized that, quite apart from the specific nonimpairment standard enunciated in section 603(c) of FLPMA, the Secretary has always, since at least the 1933 amendments to the Mineral Leasing Act, had the authority to suspend operation and production activities for conservation purposes. See Act of Feb. 9, 1933, 47 Stat. 798, as amended, 30 U.S.C. § 209 (1988). Conservation, as used in this provision, has been expressly interpreted to include the prevention of environmental damage. See Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981). It would be passing strange to suggest that, even though this lease issued under statutory provisions which expressly recognized the Secretary's authority to suspend operations thereunder for conservation purposes, such purposes may not include protection of wilderness qualities since section 603(c) of FLPMA was not enacted until after the lease issued. 15/ Nor can we discern any support for such a suggestion from the IMP.

15/ Indeed, such an interpretation would seem directly contrary to the Circuit Court's declaration in Rocky Mountain Oil and Gas Association v. Watt, supra, that "§ 603(c)'s nonimpairment standard 'remains the norm,'

On the contrary, section III.J.1.d. of the IMP expressly reiterates that "[t]he Secretary of the Interior has the discretionary authority to direct assent to a suspension of the operating and producing requirements of an oil and gas or geothermal resources lease if it is in the interest of conservation to do so and when the specific circumstances involved warrant such action." As we read the changes effected by the 1983 revisions to the IMP, the fact that a pre-FLPMA oil and gas lease embraces land within a WSA no longer automatically requires denial of an APD which would result in impairment of the land's wilderness characteristics (as it did under the 1979 version of the IMP), but neither does it prevent the suspension of operations under the lease in the appropriate circumstances, which circumstances may include consideration of the land's wilderness potential. That latter determination, of course, must be made on a case-by-case basis.

Clearly, the mere fact that land is included within a WSA cannot, in every situation, mandate a suspension since such an approach would effectively abrogate the 1983 amendments to the IMP. But certainly there can be situations in which the wilderness potential of the land, when considered either by itself or in conjunction with other factors such as, in the instant case, the existence of significant cultural resources, might pro-vide adequate grounds for the exercise of discretion to suspend operations under the lease.

---

fn. 15 (continued)
1981 Opinion at 4, with respect to all mineral leases, regardless of their date of issuance." Id. at 746 n.17 (emphasis in original).

Obviously, as in all exercises of discretion, the decision to suspend or not to suspend requires the application of the authorized officer's informed judgment and, on appeal, the authorized officer's conclusions would normally command substantial deference on our part. See, e.g., Oregon Natural Desert Association, 125 IBLA 52, 60 (1993); Hoosier Environmental Council, supra at 172-73. The problem in the instant case resides in the fact that a review of the ROD and the EA makes it abundantly clear that no consideration was given to the possibility of suspending operations on that portion of the lease within the Cross Canyon WSA at least until such time as a final decision was made by Congress on the ultimate status of the land. It is self-evident that, having failed to recognize the existence of discretionary authority to suspend operations, the authorized officer has failed to bring his informed judgment to bear on this question such as could justify the Board in deferring to his expertise. In such circumstances, it appears to us that the appropriate course of action is to set aside the decision approving the APD and remand the matter for consideration of whether, in the exercise of discretion, operations and production requirements within that portion of lease COC 26082 should be suspended pending ultimate resolution of the wilderness status of the land. Cf. State of Wyoming Game and Fish Commission, 91 IBLA 364 (1986) (EA failed to adequately consider appropriate alternative); Sierra Club (On Judicial Remand), 80 IBLA 251 (1984) (EIS failed to adequately consider "no action" alternative).

We wish to make it clear, however, that we are not, at the present time, intimating any view on whether or not suspension of operations is

warranted in the instant case. We merely hold that, insofar as oil and gas lease operations are concerned, where an APD will result in a violation of the nonimpairment standard on lands within a WSA, consideration should be given whether, in the exercise of discretion, operations under the lease should be suspended to await a final determination on the status of the lands. 16/

[4] The last issue presented for consideration involves the challenge to the issuance of the associated right-of-way to provide access

from outside the WSA to the lease. Appellant CEC challenges BLM's asser-tion that "[i]mplicit in recognition of those pre-FLPMA rights [of oil and gas lessees] is reasonable access" (Deputy State Director's decision at 3). CEC argues that this assertion has no basis in fact and is contrary to

the well-recognized rule that, as a general matter, issuance of a Federal oil and gas lease does not guarantee access to the leasehold, citing, inter alia, 2 Law of Federal Oil and Gas Leases 22.01 (1992), at 22-4 and the decision in Coquina Oil Corp. v. Harry Kourlis Ranch, 643 P.2d 519, 523 (Colo. 1982). Since access to the leasehold is not guaranteed, appellant argues that such access cannot constitute a valid existing right within

16/ In light of this determination, we will not reach the additional issue raised by appellants concerning whether directional drilling from land outside of the WSA was adequately considered in the EA and ROD. See CEC SOR
at 15-17; SUWA SOR at 19-21. While this question may impact on any determination as to whether the discretionary authority to suspend should be exercised, we believe it would be more appropriately reviewed if and when
an appeal is filed from a determination of the authorized officer on the question of suspension. Furthermore, in light of our disposition of appellants' challenge to the right-of-way (see discussion infra), this issue may well be moot.

the meaning of section 701(h) of FLPMA such as would permit violation of the nonimpairment standard established by section 603(c) of FLPMA.

In response, BLM notes that while appellant's assertion that issuance of an oil and gas lease does not guarantee access is generally correct, it is not a universal truth. BLM points out that in Utah Wilderness Association, 80 IBLA 64, 91 I.D. 165 (1984), the Board, relying on section 1323(b) of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3210(b) (1988), held that BLM must grant access to privately-owned land surrounded by public lands even if such access results in violation of the nonimpairment standard applicable to WSA's. Arguing that

an oil and gas lease constitutes an "interest in the land," 17/ BLM

17/ BLM readily admits, however, that whether an oil and gas lease is an interest in land is, itself, dependent upon the theory as to the nature of an estate in oil and gas, citing 1 Williams and Meyers, Oil and Gas Law § 202.1 (1990), and 1A Summers, The Law of Oil and Gas §§ 155-170 (Supp. 1985). Starting with the premise that "[p]ossession of the property interest in Federal oil and gas leases is governed by normal rules of State property law," BLM proceeds to suggest that, if an oil and gas lease were deemed to be an "interest in the land," under Colorado State law, it would be an "interest in the land" under section 1323(b) of ANILCA. We do not agree.

Regardless of how Colorado might treat the leasehold interest of a Federal oil and gas lessee as a general matter, the question herein relates to the interpretation of the scope of a Federal statute, and it is the Federal interpretation which must control. Indeed, carrying BLM's argument to its logical extent would result in a situation in which the provisions of section 1323(b) of ANILCA would apply to leases in some states but not in others, dependent upon whether the State deemed oil and gas leaseholds to constitute an "interest in the land."

In any event, as explained infra in the text of this decision, it is unnecessary to determine whether a Federal oil and gas lease constitutes an "interest in the land," since, for reasons subsequently explained, we conclude that section 1323(b) of ANILCA is not applicable to Federal oil and gas leases regardless of whether or not they are considered to be an "interest in the land."

argues that under the Board's Utah Wilderness Association decision, it was required to grant Ampolex access to the drilling site. For a number of reasons, we do not agree.

Initially, we must note that any reliance upon the decision in Utah Wilderness Association, supra, is misplaced. The pivotal holding in that split decision was that section 1323(b) of ANILCA was applicable to all BLM lands and not merely to BLM lands in Alaska. Subsequent to the issuance of that decision, however, a suit for judicial review was filed in the United States District Court for Utah. By Memorandum Opinion dated December 16, 1985, the suit was dismissed as moot. See Utah Wilderness Association v. Clark, C84-0472J. However, as a precondition to the dismissal for mootness, the Court also issued an order directing the Board to vacate its decision in Utah Wilderness Association, supra. By Order dated February 26, 1986, the Board, in compliance with the Court's decision, vacated that decision. Thus, there is no decision presently on point determining the applicability of section 1323(b) of ANILCA to BLM lands outside of Alaska, and that question must be deemed to remain open. 18/

18/ As the Court related in its memorandum opinion, the purpose of requiring the Board to vacate its decision was to "wip[e] the slate clean." In retrospect, it is clear that the failure of the Board to issue a decision vacating its prior determination, as opposed to the unpublished order which it did issue, was a mistake, particularly since the Court's decision was also unpublished. Obviously, the parties to this appeal were not aware of the subsequent history of the Utah Wilderness Association case. Hopefully, the Board's decision herein will forestall further confusion on this question.

We also note that the BLM Manual asserts that section 1323(b) applies nationwide. See BLM Manual 2801.49A. No basis for this assertion, however, is provided in the Manual and it is possible that the authors were misled on this point by the failure of the Board to publicize the order vacating its Utah Wilderness Association decision. In any event, BLM Manual provisions are binding neither on this Board nor on the public at large. See,

But, notwithstanding the foregoing, we need not revisit the question of whether section 1323(b) of ANILCA is applicable to lands outside of Alaska since, for reasons which we will set forth, we conclude that even were it so applicable it would not affect the outcome of the instant case. We reach this conclusion based on two separate lines of analysis. The first involves interpretation of the statutory language involved. Section 1323(b) of ANILCA provides:

> Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of the Interior may prescribe, the Secretary shall provide such access to nonfederally owned land surrounded by public lands managed by the Secretary under [FLPMA] as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to access across public lands.

This statute, by its express terms, requires the provision of access to an "owner" seeking access to "nonfederally owned land." Regardless of whether or not a lessee could qualify as an "owner" of land within the meaning of this section, it is obvious that the land embraced by oil and gas lease COC 26082 could not be classified as "nonfederally owned land" under any theory. In the absence of any legislative history which might suggest a Congressional intent to include Federally-owned land in which an individual held a leasehold interest within the scope of the term "nonfederally

---

fn. 18 (continued)
e.g., Cities Service Oil and Gas Corp., 109 IBLA 322 (1989); United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). Thus, the Board views the question of the nationwide applicability of section 1323(b) of ANILCA as open, notwithstanding any implication to the contrary in the BLM Manual. But see Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 546-55 (1987); Village of Gambell v. Hodel, 869 F.2d 1273, 1278-80 (9th Cir. 1989).

owned land," it is impossible to conclude that such land is covered by section 1323(b) of ANILCA. 19/

Moreover, quite apart from the problems of statutory construction, this section is irrelevant for a totally independent reason. The issue under review is whether or not a right of access to the leasehold existed such that it was protected under section 701(h) of FLPMA from applica-tion of the nonimpairment standards of section 603(c) of FLPMA. FLPMA was, of course, enacted in 1976. ANILCA, however, was not adopted until December 2, 1980. Thus, to the extent that FLPMA pre-dated the adoption of ANILCA, rights of access based on the latter Act could not, as a matter of chronology, be valid existing rights under the former. Thus, we must conclude that nothing in ANILCA supports BLM's contention that the right of access to the leasehold was protected as a valid existing right under section 701(h).

[5] Since the provisions of section 1323(b) of ANILCA are not rele-vant herein, the question then arises whether Ampolex had access rights

19/ The Court in Montana Wilderness Association v. U. S. Forest Service, 655 F.2d 951, 955 (9th Cir. 1981), noted that the legislative history on this section was "surprisingly sparse." The few references which were made to this provision invariably referred to "inholders" or "landowners," terms not normally associated with oil and gas lessees. See, e.g., S.Rep. No. 96-413 at 310, reprinted in 1980 U.S. Code Cong. & Admin. News at 5254; 126 Cong. Rec. 24912 (1980) (statement of Representative Weaver); 126 Cong. Rec. 29262-63 (1980) (statement of Representative AuCoin); 126 Cong. Rec. 30369-70 (1980) (statement of Senator Melcher). Moreover, a comparison of the language of section 1323(b) with that of section 1110(b) of ANILCA, 16 U.S.C. § 3170(b) (1988), shows that where Congress intended to cover leaseholds in access provisions it took special care to make its intent clear. Thus, section 1110(b) provides that the Secretary shall provide "adequate and feasible access" to privately-owned lands in conservation units, "including subsurface rights of such owners underlying public lands." No comparable language appears in either section 1323(a) or section 1323(b).

to the leasehold boundary as an incident of the lease such as could constitute a valid existing right under section 701(h) of FLPMA. Nothing in the express terms of the lease purported to grant Ampolex such access and, we note, appellant's assertion that no implied right of access across unleased lands arises upon issuance of a Federal oil and gas lease is substantially correct. While an implied right of access to mineral locations under the General Mining Laws had, prior to FLPMA, long been recognized (see, e.g., Alfred E. Koenig, 4 IBLA 18, 78 I.D. 305 (1971); Rights of Mining Claimants to Access Over Public Lands to Their Claims, M-36584, 66 I.D. 361 (1959)), and was expressly protected in section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), the situation with respect to oil and gas leases has been much different. As the leading treatise on the subject has noted:

> The Mineral Leasing Act of 1920 converted oil and gas from locatable minerals to leasable minerals. Although section 29 of the Mineral Leasing Act gave the Secretary of the Interior the authority to grant rights-of-way, unlike the general mining laws, the Act provided no right of access to minerals subject to its provisions. Neither the courts nor the Department of Interior have since recognized an implied right of access across federal lands to leased federal oil and gas. The current Department of Interior policy on rights of access is set forth in a 1978 Instruction Memorandum of the Bureau of Land Management as follows:
>
> > The Bureau does not guarantee access to mineral lease areas, either through the construction of BLM roads or the acquisition of rights-of-way across private or non-BLM lands that may control access to BLM mineral lease areas. In effect, BLM mineral leases are issued on a caveat emptor basis, and the Bureau makes no claims that guaranteed access exists [BLM Instruction Memorandum 78-67].
>
> Thus, an oil and gas developer, once having had absolute rights of access, now has no guarantees that it will be able to reach its leasehold. Therefore, a federal lessee must carefully evaluate its access problems and the possible solutions.

2 Law of Federal Oil and Gas Leases, 22-4 (1992) (footnotes omitted).

This limitation has been remarked upon by other commentators. Thus, in contrast to the access rights granted mineral locators, it has been noted that "[o]il and gas leases and all other entries not resting on the mining law enjoy no parallel right of access at all; access in such cases can be granted or denied at the discretion of the managing agency, and

must be exercised pursuant to applicable statutory or regulatory requirements. * * * In short, present law provides broad authority to deny or significantly burden access to mineral leases previously issued by the federal government." C. Martz, R. Love, C. Kaiser, Access to Mineral Interests by Right, Permit, Condemnation or Purchase, 28 Rocky Mt. Min. L. Inst. 1075, 1080, 1095-96 (1983). 20/ See also Coquina Oil Corp. v. Harry Kourlis Ranch, supra at 523 ("the federal oil and gas leases clearly notified Coquina that the federal government did not guarantee access to the leasehold").

20/ Admittedly, it must be acknowledged that, prior to the adoption of FLPMA, some commentators had argued that, notwithstanding the Department's failure to recognize it, an implied right of access to oil and gas leaseholds could be derived from the provisions of the Mineral Leasing Act. See, e.g., J. Due, Access Over Public Lands, 17 Rocky Mt. Min. L. Inst. 171, 194 (1972). However, as another commentator noted subsequent to FLPMA's adoption, "[S]ection 302(b) [of FLPMA] does not support a continued implied right of access for oil and gas operators." L. Lewis, Access Problems and Remedies for Oil and Gas Operators, 26 Rocky Mt. Min. L. Inst. 811, 842-43 (1980). Indeed, since section 302(b), 43 U.S.C. § 1732 (1988), by its express terms, provides protection of the "rights of ingress and egress" of locators and claimants under the Mining Law of 1872, the failure of Congress to similarly provide such protection to mineral lessees would support the conclusion that Congress did not view these interests as being vested with any implied rights of "ingress and egress."

Decisional law in the Department has followed a similar tack. Thus, in Frances R. Reay, 60 I.D. 366, 368 (1949), the Department held that a Federal oil and gas lease grants no rights in lands outside the subdivi-sions described in the lease. This holding was reaffirmed both in Solicitor's Opinion, Right-of-way Requirements for Gathering Lines and
Other Production Facilities Located Within Oil and Gas Leaseholds, M-36921, 87 I.D. 291, 302 (1980), and in Gas Company of New Mexico, 88 IBLA 240, 242-43 (1985).

In view of the foregoing, it must be concluded that issuance of the oil and gas lease herein did not guarantee subsequent issuance of access rights thereto. Since no guaranteed access existed, the grant of the right-of-way to the lease premises in the instant case cannot be approved on a theory that Ampolex had a valid existing right with respect to access. Thus, in the absence of a showing of "grandfathered" uses, the nonimpair-ment standard would generally apply with respect to the granting of access to leases within a WSA. But, whether it applies herein requires analysis
of one additional factor, i.e., does the fact that the lease is now within
a unit alter the application of the nonimpairment standard where the access road will cross lands outside of the original lease boundaries but now within the unit?

[6] In examining this question, we start with the recognized proposition that Federal lands committed to an approved unit agreement are treated as a single lease for various statutory requirements, not the least important of which is the determination that a lease has been extended beyond

its primary term either by production under the unit plan or by the conduct of diligent drilling operations on committed lands over a lease's anniversary date. See, e.g., Energy Trading Inc., 50 IBLA 9, 12 (1980); General Petroleum Corp., 59 I.D. 383, 388 (1947). Consistent therewith, it has been noted that "[w]hen a federal unit has been approved and the unitized area is producing, rights-of-way are generally not required for production facilities and access roads within the unit area." 2 Law of Federal Oil and Gas Leases at 22-9. 21/ The question before the Board is whether, given the application of this principle within the factual construct of the present appeal, committing this lease to the McElmo Dome unit subsequent to the adoption of section 603(c) of FLPMA allows construction of an impairing road to gain access to the lease boundaries where the road to be constructed would be located on other lands committed to the unit. We do not believe that such is the case.

Critical to our conclusion is the fact that, save for grandfathered uses and valid existing rights (i.e., rights in existence when FLPMA was enacted), the Secretary of the Interior was affirmatively charged with preventing impairment of wilderness values during the period of wilderness review. Given the discretionary nature of the authorized officer's authority to approve a unit agreement (see discussion supra), approval of a unit agreement which would permit impairment of an area by actions which were

21/ The origin of the distinction between producing and drilling units is not clear. In any event, it is important to note that even in those situations in which a right-of-way is not required, the operator must still obtain BLM approval of the access road. As the BLM Manual notes, this can be done either as part of the APD approval process or in the processing of a notice of staking. See BLM Manual 2801.32C2.

neither "grandfathered" uses nor valid existing rights as of the date of FLPMA's adoption would constitute an abuse of discretion.

This is a fundamentally different issue than that which we examined above concerning the authorized officer's failure to pre-condition approval of the unit upon the imposition of nonimpairment restrictions to the leasehold. In the former situation, at the time of both FLPMA's enactment and the approval of the McElmo Dome unit, the lessee was clearly possessed of the right to impair the wilderness characteristics of the land within the lease, if application of the nonimpairment standard would unreasonably interfere with enjoyment of the lease. This right, therefore, constituted a valid existing right within the meaning of section 701(h) of FLPMA and the question was whether, as a condition of approving the unit agreement, the Department was required to obtain a waiver of this right.

The present question, by contradistinction, involves a totally different scenario. Insofar as off-lease rights of access were concerned, the lessee possessed none when FLPMA was passed and had none when committal to the unit was approved. To allow the approval of the lease's committal to the unit to serve as a basis for authorizing the construction of wilderness-impairing access to the lease across WSA lands beyond the original lease boundaries would be to recognize a right which was neither a "grandfathered" use nor a valid existing right. It would constitute the creation of a right

to impair a WSA where none existed prior to FLPMA and, as such, is prohibited by section 603(c) of FLPMA. 22/

We hold, therefore, that where a pre-FLPMA lease is surrounded by land within a WSA, the subsequent inclusion of that land within a producing unit does not serve to grant the lessee any rights to construct wilderness-impairing access from other parts of the unit to the lease. Thus, BLM's decision approving right-of-way COC 53315 must be reversed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision approv-ing the APD for COC 26082 is set aside, the decision issuing associated right-of-way COC 53315 is reversed, and the case files are remanded for further action consistent herewith.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

22/ Of course, in those situations in which a pre-FLPMA lease had been committed to a producing unit prior to the adoption of FLPMA, the right of access across other leases committed to the unit would constitute a valid existing right within the meaning of section 701(h) of FLPMA.